



A HISTORICAL Judgement



A JUDGEMENT
BY
PANDIT THAKUR PARSHAD DUBEY
MUNSIF, JAUNPUR
SUIT No.565 OF 1936

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Price : Rs. 25

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IN THE COURT OF THE MUNSIF, JAUNPUR.

Present :- **PANDIT THAKUR PRASAD SAHIB,**
M.A. LL B.,
MUNSIF, JAUNPUR.

SUIT NO. 565 OF 1936

1. SYED ALI MOHAMMAD
2. SYED SHABBIR HASSAN
3. SHAH ALI HAMMAD
4. SHAH MOHAMMAD TAQI
5. SH. ABDUL MAJID

PLAINTIFFS.

VERSUS

1. S. SH. ALI HUSSAIN
2. KHAN SAHEB
3. M. ABDUL BATIN
4. M. QAYAMUDDIN
5. SH. ABDUL RAB
6. SYED HAMID HUSSAIN
7. SH. SHAMSUDDIN AHMAD
8. SH. ABDUL HAMID
9. BAQREEDOO
10. HAIDER HUSSAIN
11. MOHAMMAD SADDID KHAN
12. M. ABDUL WAHID KHAN
13. HAKIM YASAN
14. SH. WALI MOHAMMAD

DEFENDANTS.

JUDGMENT

This is a notorious case arising out of facts and circumstances that have been the cause of the acutest of ill-feelings existing between the Shias and the Sunnis, the two major sections of Muhammadan population of this town, resulting in a series of breaches of peace and in a recent riot of considerable seriousness and gravity. The Plaintiffs in this case represent the Shia Section and the Defendants the Sunni Section of the Muslim Community.

The Plaintiffs' case is that they are the inhabitants of Jaunpur and follow Shia religion which essentially consists of their extreme affection and respect for AHLE- BAIT, i.e. for the house of the Prophet and particularly for Hazrat Ali and his two sons, Hazrat Hassan and Hazrat Hussain. It is a principal part of their belief that Hazrat Hussain's claim to the Khelafat of the Islamic Common wealth was flagrantly and unjustly denied and usurped for Yazeed by the house of Ommaiya and that the murder of Hazrat Hussain at the battle of Karbala was the most unjust and the most inhuman act ever recorded in Muslim history. They have, therefore, been celebrating

the Martyrdom of Hussain since centuries in every part of the globe, where their population predominates or exists. They have been doing the same thing at Jaunpur since long. Their specific case here is, that on the 19th of Safar every year they start their procession from a place called Imambarai Islam, which while passing through the highways of Jaunpur, crosses a public street called QAZI- KI- GALLI, and goes back to a place called Imambarai Sadar. In pursuance of an ancient practice and custom they have been conducting this kind of Tazia procession accompanied with nauha and Matam, (wailing and weeping) in accompaniment of the beats of Tahsha and Tabal and in the course of which, while wailing over the miseries and martyrdom of Imam Hussain and over the loss which the Islamic world has sustained by his murder, they condemn his murderers and call imprecation on them and specially on Omer-i- Bin Sad, Hurmula Shanan, Yazeed, Shis, Shmr and Khuli. That the Sunnis in general obstruct this religious function of the Shias and deny their legal rights of the same. The Plaintiffs, therefore pray as follows :-

"Let a decree be passed in favour of the Shias for a declaration that they have a right to carry on and conduct their religious procession in the accompaniment of the sounds of Tabal and Tasha with Nauha and Matam over the martyrdom of Imam Hussain, and with recitations of imprecations or Lanats on the aforesaid seven persons on every highway of Jaunpur and on the Qazi-ki- Galli of Jaunpur."

The defence denies the legal right of the plaintiffs claimed by them in their plaint on the following grounds set forth in the defendants' written statement :-

- (1) The Shias, while carrying their processions secretly, call imprecations on the first three Caliphs known as Khulafa-i- Salasa, which is illegal and hence the local executive have been putting fetters over the exercise of the plaintiffs' rights. It is a wrong allegation of the plaintiffs that they condemn and call lanat on the murderers of Hussain while conducting their procession. What they really do is that they call lanat on Khulafa-i- Salasa, while putting up a show of a different kind.
- (2) Even the lan on the seven persons desired by the plaintiffs is bad because one of them, Omer Bin Sad, was a relative of the Prophet and Shmr was the brother-in-law of Hazrat Ali, and rest of them were all Musalmans and hence Lanat over them by name is an offence and cannot be legally allowed. The recitation of Lan, which is technically called Tabarra, is done by the plaintiffs under the protection of the sounds of Tabals which drown their words and make it inaudible for others and this act of the Shias is illegal and the Local executive, therefore, put restriction over the plaintiffs' processions.

- (3) The defendants did not interfere with the plaintiffs's exercise of their alleged rights nor did they move the Local authorities to take steps against the Shias for the same and hence the plaintiffs have no cause of action against the defendants.
- (4) Furthermore, there is a section of Musalmans at Jaunpur, which considers the seven persons named by the plaintiffs, as their Peshwas and the calling of Lanat on these persons raises a likelihood of a breach of peace on that score.
- (5) Apart from all these, Taziadari and wailings are against the Shia religion itself and hence no relief for that should be granted.
- (6) The Secretary of State of India was a necessary party to this suit and the suit is bad for non-joinder of necessary party.
- (7) The last plea of the defendants is that a declaration is a matter that rests with the Judicial discretion of the Court, and as the procession desired may lead to breach of peace, the Court should refuse such a declaration.

The following issues therefore arise for determination in this case :-

- (1) Are the plaintiffs entitled to take out their religious processions alleged in the plaint?

- (2) Are the defendants legally entitled to raise any objection to the plaintiffs taking out their procession in the manner alleged by the plaintiffs?
- (3) Is the Secretary of State for India a necessary party, if so, how does it effect the suit?
- (4) Whether the plaintiffs have any cause of action for the suit?
- (5) To what relief, if any, are the plaintiffs entitled?

FINDINGS

Issues (1) & (2)

For a proper appreciation of the parties' controversies in this case and their points of views over the subject matter of the suit, it is very necessary to narrate in a brief compass that portion of Islamic history which records the events of the origin and causes of the divergence of these two sects of Islam. Both the Communities proclaim and do possess implicit confidence in MOHAMMAD, the Prophet and his preachings and injunctions. They have complete faith in the Quran. Upto the death of the Prophet there was no difference of any kind among the faithful believers of the Islam as preached by him.

On his death the most crucial question that faced the Islamic world was the question of the appointment of his successor, who was to be called a Khalifa or the temporal and spiritual Head of the Islamic Commonwealth of the world. On his death, the Prophet left behind him his only surviving widow, Hazrat Aisha, his most beloved cousin and son-in- law, Hazrat Ali, who was married to his only daughter Fatima, and Hassan and Hussain, the Prophet's two grandsons, who were the sons of Ali and Fatima, the Prophet's daughter. He left no other member of the Ahle Bait after him. As observed by Mr. Justice Arnold, in his famous judgment in the important Khoja case of the Bombay High Court, occurring in the well quoted part of it, "The general expectation of Islam had been that Ali, the first disciple, the beloved companion of the Apostle of God, the husband of his only surviving child, Fatima, would be the first Caliph. It was not to be. The influence of Aisha, the young and favorite wife of Mohammad, a rancorous enemy of Fatima and Ali, procured the election of her own father, Abu Bakr He (Ali) was and deserved to be deeply beloved, being clearly and beyond comparison, the most heroic of the time, fertile in "heroes" - a man brave and wise and magnanimous and just and self-denying in a degree hardly exceeded by any character in history. He was, besides, the husband of the only child of the Apostle of God, and their two sons Hassan and Hussain, had been the darlings of their grandfather who had publicly given them the title of 'the foremost among the youths of Paradise' "It cannot be denied that Hazrat Ali was one of those men who stood by the

Prophet all his life in everything he did and wanted to be done. As I gather from history written by the Muslims and non- Muslims alike, Ali was the Prophet's constant shadow. He was the Boswell of a Johnson in his dealings with the Prophet. Ali can rightly be said to be the chief builder of the Prophet's powers (wise in the council Chamber and valiant warrior in the battle field was he). To his sword had fallen the momentous victories of Khandak, Ohad, Badr and Khaiber. But for these, Mohammad's mission would have perished in its very inceptions and the world would have lost a reformation unequaled in man's history. The consolidation of the temporal power of Mohammad by Ali made it possible for the message of Islam to be delivered in an unbelieving age. It would thus appear that Ali was the most highly entitled and the best deserved for succession to the Imammat of Islam, both on the strength of his own merits being the sincerest friend and follower of the Prophet, and the Shias believe that had there been even and open and fair election, Ali would have won. Another ground of his claim to the Khelafat was the fact that the Prophet himself during his lifetime had openly announced to the words at large, his desire for Ali's succession. I would quote the following passage occurring in the book of history of Mohammadan Empire by Major Price, at Page 11, "On his return from Mecca on this occasion the Prophet's demeanor with respect to Ali gave indications sufficiently strong of the person who designed to succeed him, at least in the reverence and esteem of his disciple, if not in all the honours of temporal powers. At the conclusion of

one of the stages of his journey and under the shadow of a grove of trees at Ghadir-i- Khum, having caused a sort of tribunal to be formed with the furniture of his camels, and summoned the observant multitude to attend, he ascended this with Ali on his right hand and addressed the assembly he proceeded to say then that to all to whom he was truly dear, Ali, the son of Abu Talib, must be so equally. He then stretched his hands to place Ali higher up in the tribunal, in doing which the latter set his foot on the Prophet's knees. Resuming his address, the Prophet now said that as many in the great assembly as acknowledged himself for sovereign lord would not fail to offer the same acknowledgment to Ali. He now addressed himself solemnly to Heaven, calling upon God to be friend of the man who was the friend of Ali and to be the eternal enemy to those who were hostile to his cause :.... After this he returned to his tent directing Ali to retire to his own, where the whole assembly were enjoined to meet and offer him their congratulations on this public and solemn designation of his appointment to succeed. "Major Price, we have to note, is an important authority on the Muslim history of early times.

This authority puts the cause of Ali for his claim to the throne on a very high plane and very secure basis. The misfortune of Ali was that he was very simple in habits, unostentatious in manners and weak in pressing his claim. On the Prophet's death, he was busy in his obsequies and Aisha in the meantime, exerted her full influence as the Prophet's beloved widow and got the election of her father secured. He

had another misfortune of having incurred the most hostile displeasure of Aisha, the most dominant personality in the Prophet's family at that time and had considerable control and influence over the Prophet, particularly in his last days. This Ali had stood against Hazrat Aisha on the most serious occasion when her fidelity to the bed of her husband was suspected. He did so, not on any other ground except that of serving the cause of the Prophet to his best. Aisha kept this enmity in her heart and when occasion arose, put her whole weight against Ali and pulled him down. She got her own father, Abu Bakr, who was a man of considerable influence at that time elected to the throne of Khilafat, whereby the whole claim of Ali was thrown to the winds. A section of the most faithful believers of the Prophet and his Islam at that time felt the sting of this act of injustice very keenly. This class believed that Hazrat Ali was the only person entitled to succeed. They are the men who believed that it was the birth right of Ali and his sons to have succeeded to the spiritual and temporal headship of Islam and that all the three Caliphs, Abu Bakr, Omar and Osman, were the usurpers of the right of Khilafat and they were all guilty of having deprived Ali of his rightful inheritance. This was the class which subsequently came to be known by the appellation of SHIAS, meaning the adherents or followers. These Shias are thus the followers of Ahle Bait, the house of Prophet, namely Ali and his sons Hassan and Hussain, and the Fatima, the Prophet's daughter. The sections of the Mohammadans who did not accept the claim of Ali for the grounds already set forth, but based the principle of

election as the main ground for the selection of their Khalifa, subsequently came to be known as Ahle Sunnat or Sunnis. Upon the death of the third Caliph, Osman, the claim of Hazrat Ali was ultimately accepted and he was enthroned on the caliphate but the forces of the opponents against him continued to work. The main opponents and enemies of Ahle Bait, the Ommaiya, a class of the tribe of Qureshis of Arabia, whose principal leader was one Abu Sufian. He was one of the deadliest enemies of Mohammad and his mission, and he fought tooth and nail at every setup in the propagation of Islam or in the spread of his temporal powers. When however, the powers of Mohammad both temporal and religious had assumed uncontrollable and invincible form, Abu Sufian and his family embraced Islam under considerable reluctance. The embers of the fire of rancour and ill will against Mohammad and his Islam still remained alive in their hearts though suppressed superficially. Moawiya was the son of this Abu Sufian. He was after Ali, and Ali was subsequently assassinated under very treacherous circumstances. This Moawiya was a very powerful man and he had secured a division of Islamic kingdom between himself and Ali, during Ali's own lifetime. Ali, was however not allowed to reign in peace and while the strife between Moawiya aided by Hazrat Aisha, continued with Ali, the latter was slain by a Musalman fanatic in the Mosque of Kufa, a town on the west bank of the Euphrates. After his death, his elder son, Hassan, became entitled to succeed him. As observed by Arnold, J. "Hassan, the elder, a saint and recluse on the death of his father sold his birthright of

his empire to Moawiya for a large annual revenue which during the remainder of his life he expended in works of charity and religion at Medina. In the year 669 A. D., this devout and blameless grandson of the Apostle of God was poisoned by one of his wives, who had been bribed to that wickedness by Yazeed, the son of Moawiya and the second of the Ommaiya caliphs of Damascus. "There thus remained as head of the direct line of the Apostle of God, Hussain, the younger son of Fatima and Ali, a brave and noble man in whom dwelt much of the spirit of his father. Moawiya before his death nominated his son Yazeed to be his successor. On his death and this he did in complete violation of the terms of the contract entered into between him and Imam Hassan, thereunder on the death of Moawiya, Imam Hassan or Imam Hussain was to become the Caliph. Shortly after, Moawiya died and Yazeed mounted the throne of his father as a matter of inheritance pure and simple.

This act of Moawiya in nominating his own son to succeed him as Amir and Caliph was in flagrant contravention of all the precedence of Islamic succession of Caliphs. The succession of Yazeed was, therefore, illegal in its very inception. This Yazeed, as observed above, was the grandson of Abu Sufian. Ever since Hazrat Umar allowed a part of the Caliphate to be enjoyed by Moawiya a new leaf in the history of Islam was opened by the house of Ommaiyas, to which Moawiya and his father Abu Sufian, the greatest enemy of Islam and Prophet, belonged. These Ommaiyas established their complete supremacy in

Syria with their capital at Damascus. They began to preach a different form of Islam and thereby attempted to undermine the Prophet's religion, thus at this time there was a pretended Islamic religion taught at Damascus under the Ommaiyads caliphs, but the flicker of the light of the true Islam yet continued at Medina under the patronage of the adherents of Ahle Bait. This important episode in Islamic history marks a very crucial stage through which the religion of the Prophet had to pass. If Moawiya and his family had succeeded in crushing the power and the spirit of the Ahle Bait at Medina, the history of Islam at this date would have been entirely different. Probably the Islam of the Prophet would have perished long ago. The members of the house of Ommaiya, who had played an important part during those unsettled times besides being the enemies of the Prophet, were men of undesirable characters. As observed by Gibbon, in his History of the Decline & Fall of the Roman Empire on page 190, "Except among the Syrians, the Caliphs of the house of Ommaiya had never been objects of public favour. The life of Mohammad records their perseverance in idolatry and rebellion, their conversion have been reluctant, their elevation irregular and their throne was cemented with the most holy and noble blood of Arabia. "Even the more disinterested English authors like Price, Gibbon and Gilman condemned Moawiya and Yazeed in the strongest of terms (vide Price's History of the Mohammadan Empire, Page 386; Gibbon's Decline & Fall of the Roman Empire, Page 190 and also the Short History of the Saracens by Amir Ali, Page 81;) that the whole policy and action of

Moawiya and Yazeed were highly unislamic and utterly illegal and immoral, was admitted by Moawiya himself when he lay on his death bed and probably thought of his retribution on the day of judgment. I quote Major Price on this point, "Moawiya is said to have finally acknowledged to his ministers before he expired that there were to him three things as were the source of bitter regret. First, that he should have suffered himself to be misled by the spirit of ambition to deprive the sacred family of the Prophet of their rights, secondly that he should not have suborned the wife of Imam Hassan to poison her husband and, thirdly that he should not have prematurely nominated Yazeed to succession." (Page 389, Price's History of the Mohammadan Empire, Volume 1.) Sometime before his death he had addressed his son and cautioned him against a number of things. Major Price observes "During his illness in the course of other admonitions, he is said to have addressed his successor, (Yazeed) in the following terms:

"Having by every human precautions secured an empire to thy hand there will remain when I am departed but four persons from whom thou art likely to experience opposition. These are, Hussain, Abdul son of Omar, Abdul Rahman, and Abdulla son of Zubair.... It will behove thee to recollect that Hussain is the grandson of the Prophet, that we have bereaved him of an empire and that all we possess was once his. Him therefore, when thou art victorious, thou wilt treat with generosity." These are the confessions of Moawiya himself of the right of Ali and his sons and of

his own misdeeds in relation to their rights. Yazeed was worse than his father. It was he who was responsible for the massacre of Karbala, an event which is one of the blacks ever recorded in any history.

When Yazeed was enthroned after the death of his father he realized fully well that his elevation was not based upon the willing consent of the Muslim world and was against all precedence so far established for the selection of caliphs. He knew that the heart of the true Muslim was still attached to Imam Hussain, the grandson of the Prophet, and he felt his position insecure during the life time of Imam Hussain. He therefore attempted to win him over and get him accept his suzerainty or to get him killed. He therefore sent his men formally demanding allegiance from Imam Hussain.

As observed above, Yazeed was not only the temporal head of the Muslim world at that time but was also the preserver and propagator of that suppressed paganism, which his father Moawiya had started at Damascus in the garb of a new Islam. While Imam Hussain realized that the kingdom was his by every conceivable principle of Islam and that his right had been usurped by the most undeserving of men under physical force, he felt that the most fatal consequence that had ensued upon the assumption of the office of the caliphate by Yazeed was the tragedy that the Islam of the Prophet was going to be permanently undermined and the paganism which the Prophet had attempted to root out was to be re-installed.

afresh in the garb of the pseudo-Islam which Yazeed was to uphold and maintain. The house of Ali was ever the custodians of the Prophet's Islam and Hussain could not suffer the destruction of the mission of his grandfather. He knew fully well that the acceptance of the Baiyat or allegiance of Yazeed did not mean only acceptance of subordination to Yazeed as a temporal king only, it meant a denunciation of the sacred trust of Islam of which he was the last custodian, and the acceptance of pagan Islam of Yazeed. He, therefore, refused to accept any subordination of Yazeed. Hazrat Ali, during his reign as caliph, had established himself and made Kufa an important town of Iraq, a town then flourishing on the banks of Euphrates near Babylon, as his capital. Kufians were naturally Ali's devotees. They were disgusted with the usurped caliphate of Yazeed and they wanted the substitution of Imam Hussain in his place. They sent innumerable invitations to Imam Hussain to come to their midst and promised their complete support in his attack upon Yazeed. Many of the friends of Hussain dissuaded him from relying upon the kufians, for they were said to be most uncertain people and utterly wanting in perseverance and steadfastness. Hussain did not mind these friendly warnings. His mind was moving on different planes. He realized fully well what was likely to come about but he felt that he had to execute the mission of preserving his grandfather's religion, and he believed that he would at any rate accomplish the same by his martyrdom for he believed in the principle that the blood of the martyr is the seed of the church. Then followed the tragedy of Karbala, which events forms

the root cause of the controversy of the suit. I will put that event in the words of Edward Gibbon, given in his History of the Decline and Fall of the Roman Empire on page 77: "The primogeniture of the line of Hashim and holy character of the grandson of the Apostle had centered in his person, and he was at liberty to prosecute his claim against Yazeed, the tyrant of Damascus whose vices he despised and whose title he had never designed to acknowledge. A list was secretly transmitted from Kufa to Medina of 140 thousand Muslims, who professed their attachment to his cause and who were eager to draw their sword as soon as he appeared on the banks of Euphrates. Against the advice of his wisest friends he resolved to trust his person and family in the hands of perfidious people. He traversed the deserts of Arabia with a timorous retinue of women and children, but as he approached the confines of Iraq he was alarmed by the solitary and hostile face of the country and suspected either the defection or the ruse of his party. His fears were just. Obaidullah, the Governor of Kufa, had extinguished the first sparks of an insurrection and Hussain, in the plain of Karbala was encompassed by a body of five thousand horses, who intercepted his communications with the city and the river. He might still have escaped to a fortress in the desert that had defied the power of Caesar and Chosroes, and confided in the fidelity of the tribe of Tai which would have armed ten thousand warriors in his defence. In a conference with the chief of the enemy he proposed the option of three honorable conditions, that he should be allowed to return to Medina, or be stationed in a frontier garrison against

the Turks, or safely conducted to the presence of Yazeed. But the commands of the caliph or his lieutenant were strong and absolute, and Hussain was informed that he must either submit as a captive and criminal to the commander of the faithful, or expect the consequences of his rebellion. 'Do you think' replied he, 'to terrify me with death? And during the short respite of a night he prepared with calm and solemn resignation to encounter his fate: he checked the lamentations of his sister, Fatima, who deplored the impending ruin of his house. 'Our trust' said Hussain, is in God alone. All things both in Heaven and Earth will perish and return to their Creator. My father, my mother, my brother were better than me, and every Musalman has an example in the Prophet.' He pressed his friends to seek their safety by a timely flight. They unanimously refused to desert or survive their beloved Master. On the morning of the fatal day he mounted on horse-bake with his sword in his one hand and the Quran in the other. His generous band of martyrs consisted only of 32 horses and 40 foot, but their flanks and rear were secured by tent ropes and by a deep trench. The enemy advanced with reluctance and one of their chiefs deserted with 30 followers to claim the partnership of an inevitable death. In every close on them or single combat the despair of the Fatimide was invincible, but the surrounding multitude galled them from a distance with a cloud of arrows and the horses and men were successively slain. A truce was allowed on both sides for the hour of prayer and the battle at length expiated by the death of the last companions of Hussain. Alone, weary and wounded, he seated himself

at the door of his tent. As he tasted a drop of water he was pierced in the mouth with a dart and his son and nephew, two beautiful youths were killed in his arms. He lifted his hands to Heaven..... They were full of blood..... and he uttered a funeral prayer for the living and dead. In a transport of despair his sister issued from the tent and abjured the general of the Kufians that he would not suffer Hussain to be murdered by force his eyes; a tear trickled down his venerable beard and the boldest of his soldiers fell back on the very sight as the dying hero threw himself among them. The remorseless Shimr, a name detested by the faithful, reproached their cowardice and the grandson of Mohammad was stained with three and thirty strokes of lances and swords. After they had trampled on his body they carried his head to the castle of Kufa and the inhuman Obaidullah struck him on the mouth with a cane. "Alas" exclaimed an aged Muslim, "on these lips have I seen the lips of the Apostle of God." The head of Imam Hussain was thereafter carried before Yazeed. Major Price observed as follows in this connection at page 410 of his history: "In the meantime Obaidullah the Governor) was abusing himself by beating the head of Hussain which lay before him, on the mouth with a rod which he held in his hand and expressing unmanly triumph by the most insulting raillery..... The head of Hussain, also after it had been sufficiently exposed throughout all the streets of Kufa, was transmitted to Damascus to announce to Yazeed on this occasion the decisive triumph of his cause. While the triumphant Yazeed yet trembled either with awe or remorse at the glowing recital delivered of these sanguinary

proceedings in his presence, he could not however withhold from bestowing like his representative at Kufa on the head of his unfortunate rival the same brutal indignity by beating it on the lips and teeth with his whip, but being interrupted in his ferocious amusement by a certain Abu Bardah, who remonstrated against these indecencies of offering such barbaous insults to those lips which had been so frequently hallowed by the kisses of the Prophet, Yazeed struck him on the breast for his bold and unexpected expostulation. "Thus ended the life and the life story of one of the saintliest figures in Arabian history. With all that has been said against Imam Hussain, he does stand out as a shining star on the horizon of the early period and the dawn of Islam as one of the matchless benefactors of mankind. He fought an army of twenty-two thousands with a band of seventy-two on his side consisting of women and children of his family and faced a voluntary death for a cause for which every true Musalman must revere. His fortitude and his faith in the will of God were unflinching till the last moment of his life. When his throat was under the dagger of Shimr, his last words were "Thy Will be done." Even Christ, when he was put on the cross, cried 'O God, O God, why have you forgotten me.' Even Socrates, when he quaffed his cup of hemlock poison, could not tolerate the wailing and the weeping of the women around him and asked them to be forcibly removed from his presence. Hussain's conduct stands unrivaled even among the principal martyrs of the world. A Shia must necessarily feel the extreme pangs of a tragedy like this for he was their

Peshwa. The whole Muslim world feels for him for he has set an example of the true Islamic Heroism in the cause of Islam, which cannot be found any where in any chapter of their history.

Those of us who do not believe either in Shiaism or in Islam can with difficulty restrain the flow of tears when the picture of that tragedy is presented before our minds in its hideous details. As observed by Gibbon, in the Decline & Fall of the Roman Empire, "in a distant age and climate the tragic scene of the death of Hussain will awaken the sympathy even of the coldest of the readers" Page 79.

It is this chapter of Muslim history which forms the basis of annual celebration of what is known as Tazia procession in every part of the glob where Shia inhabits. A Tazia is nothing but representation of the Mausoleum of Karbala. They carry the same through the streets and highways of towns and villages and recite the elegies and describe the details of the massacre of Imam Hussain and his women and children. They weep and lament and while they do so they condemn the atrocities of the persons who were responsible for these tragedies in the strongest terms which they can find. The Sunnis themselves hold Imam Hussain in high esteem and they do condemn the deeds of Yazeed and his men who brought about the murder of Imam Hussain. There is a class among Mussalmans who are known as Nasibies and they are really the followers of Ommaiya and his descendants who made war on the Ahle Bait or the descendants of

the Prophet. It is this class which alone with some show of reasoning can object against the celebration of the Martyrdom of Hussain. This class is, however, practically negligible and is little heard of in these parts. I shall deal with their objections lower below. The most important point of this score to decide is whether the Shias have a legal right of carrying on their procession on public highways in accompaniment of beatings of drums and weeping and wailing in their elegies and particularly with recitations of Lans on Hussain's murderers.

Coming to this part of the case I think that assuming the correctness of every word of the defendants' case as set out in their pleadings and evidence of the defence case cannot stand on any conceivable principle of law for I think the whole point in controversy here is concluded by high authorities. Their Lordships of the Privy Council in the famous case of Manzoor Hassan vs. Mohammad Zaman reported in 23 A. L. J. 179, have on a survey of all relevant decisions laid down that every section of the citizens are entitled to carry on their religious processions with appropriate observances of their religion on King's highways. At page 180 of the report their lordships observe as follows : "The case seems to their Lordships to raise for authoritative decision the question as to the right of religious processions to proceed along the roads in India, are certainly conflicting. The first question is, is there a right to conduct a religious procession with its appropriate observances along highways? Their Lordships think

the answer is in affirmative." This was also a case of Shias and Sunnis and there the Shias conducted in the town of Aurangabad, their religious procession with various emblems and observances all alluding to the Martyrdom of Hussain (A. S.)

Their processions used to stop at places on the public highways for weeping and wailing. The Sunnis objected to that stoppage, and wailing and weeping (technically called Matam) at a place abutting their Mosque on the ground that it disturbed their devotion in the Mosque. Their Lordships of the Privy Council did hold in that case that Shias had heir legal rights of carrying on their processions and of wailing and weeping and conducting their religious observances with the processions. They however made the grant of that declaration in Shias's favour for the exercise of their right subject to the emergent orders of the police or the executive authorities which they could pass under the Statutory Law of the land under which they were competent to put restrictions for preservation of peace and avoiding its disturbances. They specifically followed the three Madras cases, 5 Madras 304, 6 Madras 203, 26 Madras 376. In the case of 6 Madras 203, we find that their Lordships definitely laid down that the orders of the Executive and the Police must be in support of the right and for the protection of the exercise of legal rights and contrary must be only cases of emergency for which they find their resources inadequate. Their Lordships in that case clearly laid down that the orders of the Magistrate restricting the right of the Shias in the exercise of their legal rights

would be one passed in respect of special circumstances and would not be general pronouncement as to rights. The main contention of the defendants is that the recitation of Lans on the murderers of Imam Hussain in the procession in question and the carrying of Tazias, and weeping and wailings over the same are against the injunctions of Islam and they hurt religious feelings and susceptibilities of the Sunnis and Nasbies sections of Muslim communities and hence such act would not be allowed on public highways. The pronouncement of their Lordships did allow and hold that Shias had a right to stop before the Sunni mosque with their procession and the with weeping and wailing and conduct their other religious observances on the roadside near the mosque and the fact that the same would disturb the prayers and devotions of the Sunnis in the mosque did not effect the Shias rights. That the acts like these as are claimed by the Shias do not amount to an offense or a public or private nuisance is also concluded by settled authority. A bench of our Hon' ble High Court observed as follows in a case reported in 30 Allahabad 181- "Where a question in which the ordinary rights of property are involved comes before us, we must, before we can allow those rights to be infringed, endeavour to find the existence of some principle or rule of law justifying a ruling that the wishes or susceptibilities of individuals can be allowed to over-ride such rights. Acts calculated to offend the sentiments of a class do not necessarily amount to public nuisance." At another place their Lordships in that case again observed "It is a legal

rights of every person to make such use of his property as he may think fit provided that in so doing he does not cause real injury to others or offend against the law even though he may thereby hurt the susceptibility." It will be clear that their Lordships manifestly made a distinction between causing a real injury and hurting the susceptibility of others. Their Lordships clearly laid down that if a person has legal rights to do an act he can do the same inspite of the fact that the same hurts the susceptibilities of others but he cannot do the same if it causes real injuries to others. This was a case of cow-killing and the Hindus in that case had raised the objections that the very sense of hearing of a killing of a cow stirs up strongest feelings in the hearts of Hindus against the act, and hence cow-killing should not be allowed by Muslims. We have to bear in mind that so far as Hindu religion and the sentiments and traditions of the Hindus go, rights from the time of Manu the life of a cow and of a Brahman..... the best of the species of Humanity are placed on one and the same level. The offence of the killing of a cow and a Brahman is under Hindu Law to be visited with a capital punishment and under Hindu Law such offenders and sinners can never be forgiven. It has further to be noted that the Principle of Hindu religion is based patently on high principle of agricultural economy of the country, for even now the modern Indian economist holds that the problem of the poverty of the masses of this country can be solved considerably by the good race of cows..... It is a matter of common knowledge of everyday life that on point of killing of a cow, the Hindu generally has an uncompromising attitude on account of very deep

rooted traditional sentiment handed to him since immemorial antiquities. Inspite of this very grave and religiously genuine objections and very sincere prayers of the Hindus, their Lordships of our Hon'ble High Court have persistently refused to regard their sentiments and feelings and against the exercise of the legal rights of the Mohammadsans. This is what their Lordships did in 30 Allahabad 181. The same view was followed in a similar case in 26 A. L. J. 1001. In another Division Bench case reported in 1930 Allahabad page 875, Hon'ble Suleman and Sen JJ observed as follows: If cow scarifies offend Hindus individually or collectively, the act cannot be branded as a public nuisance for the law makes no allowance for the susceptibilities of the hyper sensitive. In another case of exactly the type which we have to deal in this case, Hob'bie Suleman and Young JJ held that the Hindus entitled to conduct their procession both social and religious on all the streets and thoroughfares playing music with other religious ceremonies, pass the site of mosque and that the Mohammadans of the mosque have no rights to pray for the stoppage of the same on the ground that the same causes disturbances in their religious devotions. It was by their Lordships in that case as follows: "Worshippers in mosques and temples which abuts on a highway have no right to compel the processionists to stop their music completely while passing a mosque or temple on the ground that there was continuous worship inside it. Even if music, whether religious or not, offends against the religious sentiments of another community, it cannot be objected to on that ground. The stopping of

the music would offend the religious sentiments of the processionists just as much as its continuance may offend the religious sentiments of the other. There can, therefore, be no right to insist on its complete stoppage. "At another place in that judgment their Lordships observed: "All music however bad cannot amount either to a public nuisance or a private nuisance even though it may annoy occupiers of a dwelling house situated on the road." They further observed: "The Taking out of a procession accompanied with music whether as a part of religious worship or not is within the civil rights of the Community but not an exclusive use of the highway for worship." Persons of every sect are entitled to take out religious processions through public streets provided that they do not interfere with the ordinary use of such streets by the other members of the public. In this case it is no part of the defendants case or evidence that plaintiffs' processions and music and Lans or Tablas and Tashas interfere with the ordinary use of the streets by the defendants of the other members of the public. Their only objection is that it is all against Islam and they all wound the religious feelings or susceptibilities of the Sunnis and Nasbies of Jaunpur. Their Lordships, as observed above, have laid down that such objections are entirely groundless against the exercise of legal rights which in the basis of common law of the land vests in the public or in a section thereof. I shall presently show that on facts and evidence of this case the defendants' objection on the religious or sentimental grounds is also baseless. In another case of a Bench Division reported in 1930 A.

L. J. 624, Hon'ble Mukerjee and Bennett JJ held the same. At page 638 of that report Hon'ble Mukerjee observed: "The basis of the decision in a court of law must be the civil rights alone and no account can be taken of more sentiments of a certain section of the subjects of the 'Crown'. His Lordship observed that every citizen is entitled to carry on his worship or procession in any method he likes provided that in so doing he does not effect or encroach upon the civil rights of others. His Lordship further observed at page 639 that in order that the act or acts may be interfered with they must amount either to a public nuisance or to a private nuisance. Public nuisance is defined in section 268 of the Indian Penal Code and His Lordship after a careful analysis of that section laid down that such acts as are complained of by the Sunnis in this case do not amount to public nuisance within the meanings of that section. His Lordship further observed at that page: "The utmost that can be said in this that Plaintiffs' act or acts may amount to an annoyance to the public who occupy the mosque in the vicinity during the hours of Mohammed's prayers, but if we look to whole Section (2681. P.C.) and read it carefully we shall see that this sort of annoyance which the section aims at is not the kind of annoyance which the religious ideas of a class of people may suffer on account of an otherwise innocent act of another section of the public. His Lordship therefore, observed on an analysis of a number of cases that the annoyance to a section of public based on sentimental grounds cannot be annoyance amounting to nuisance with the meaning of section 269 I.P.C. The fundamental basis of all these

decisions is the Common Law Maxim "Sic Utari Tue Ut Alienum Non Laedas" which means that every man is entitled to enjoy his own property according to his likes provided that in doing so he does not infringe the legal rights of others. The exact scope and limitation of this maxim as applied in this country have been sufficiently indicated in the decisions aforesaid. The whole law on the subject will be found very well discussed in the three cases of the Madras High Court reported in 5 Madras 309, 6 Madras 203 and 26 Madras 376. Their Lordships of the Privy Council approved all these decisions in the case reported in 23 A.L.J. 179 referred to above. Their Lordships overruled the Bombay Cases that took a contrary view. The Madras cases referred to above entirely support the Plaintiffs' contention in this case. It will thus appear that on the law of the land as it stands the defendants have no right to object even if the plaintiffs' act complained of hurting the religious feelings and sentiments of the Sunnis and Nasbis and even if it causes religious annoyance to them.

It will be too much now to say after all these decisions that a public highway cannot be used by a section of public for their religious or social procession with music recitations and other observances as has been claimed by the plaintiffs in this case. A public street or a highway is a property dedicated to public for such users and may of the cases referred to above it has been definitely laid down that it is quite legitimate for a section of the public to use a public street or a

highway for purposes desired by the plaintiffs in this cases.

As there has been very serious discussions in this case on the precise nature and the scope of law of the land as it obtains now on the legal points involved in this case. I put down the following as a summary of the law deducible from the decided case or authorities, which I shall follow for my decision in this case :

- (1) Every section of the public has a right to conduct a religious or social procession along any street or highway with such observances or emblems religious or otherwise as it may deem necessary, and with music or recitations or speeches as may be deemed appropriate for their purposes (vide 23 A.L.J.179 at 180, 1931 A.L.J. 354 at 357, 1931 A.L.J. 624).
- (2) No other section of the public is entitled to object to the taking out of such a procession or to the observance of religious or other ceremonies in the same way or to the singing of music or recitation or speeches made therein on the simple ground that it is against the religious belief of such other section and that it causes annoyance to them or hurts their religious feelings. Objections like these taken by such other section of the public can only be entertained if the processions, the religious observances or the music or the speeches amount to a public nuisance or to an offence

under the law of the land or such as infringe the legal and real right of such other section of the public (23 A.L.J. *179, 1931, A.L.J. 354, 30 Allahabad 181 and 1931 A.L.J 624 at 638 to 641).

An incidental corollary that arises for determination out of the latter part of the legal proposition is whether the acts of the Shias in this case that are objected to by the defendants amount to a public nuisance or any offence, and whether they infringe any real right of the defendants. The only relevant provisions of the Penal Law that can with any show of reason be cited as any possible offence within which the plaintiffs act can be brought are Sections 268 (nuisance) 153A, 295-A and 298 of I.P.C. Before I analyse the ingredients of these sections and attempt to proceed to see if they fit in and apply to a case like this I must lay down the facts as can be ascertained from the evidence of the records as to what is the actual nature of the acts of the Shias complained of by the defendants. Practically speaking the defendants do not seriously intend that the plaintiffs have no rights to conduct their processions in question with Matam and Nowha and Tabal and Tasha. What they really object to is their act of Tabarra or calling of imprecations on the murderers of Hussain or on the first three Caliphs. And to my mind this is the only central and the main point for decision in this case and it cannot be denied that the point is not free from difficulty.

I have given in detail the early history of Islamic growth and shown under what historical incidents the fundamental differences of the Shias and Sunnis or of the Nasbis arose. It will be clear therefrom that the Shias ardently believe that the first three Caliphs Abu Bakr, Omar and Usman were rank usurpers to the throne of the Caliphate and the very rightful person therefore was Ali. It is their fundamental belief that these first three Caliphs were enemies of Ali and his sons and of the Ahle Bait, the cause of the assassination of Ali and massacre of Karbala. They therefore on account of that deep-rooted belief, condemn and censure these first three Caliphs as their pioneer enemies. They therefore call Tabarra on these Caliphs. It is an undoubted fact of Muslim History that Hussain was one of the most striking figures and one of the greatest hero of the Muslim Faith. He may not have been a great politician or a farsighted statesman. He may have been guilty of indecision and lack of intelligence as it alleged by a French writer Mons H. Lammens, or may have been a very simple and credulous as other historians describe, but that he was the saintliest and the greatest spiritual Hero of the Muslim History cannot be denied by any. He was the grandson of the Prophet, whom he so well loved, and the only surviving progeny of the Prophet. He was massacred under circumstances which makes even the strongest of hearts melt for the pathos of that terrible incident known as the tragedy of Karbala. It is one of the cardinal beliefs of the Shias that Hussain was the rightful Caliph to succeed his father Ali, or his brother Hassan, and that Moawiya was a rank usurper

and the succession of his son Yazeed was the grossest act of injustice done by Moawiya and his followers to Islam and the Ahle Bait. Much of these beliefs of the Shias find considerable support in authentic history as mentioned above. There cannot be the slightest doubt that Moawiya who was the son of Abu Sfian, the arch enemy of Mohammad and his Islam, and his son Yazeed have ever been against the Prophet and his mission and they reluctantly out of policy accepted superficially the Prophet's religion, which they subsequently openly discarded. Yazeed and Moawiya are both depicted in authentic books of history in the blackest color and the murderers of Hussain were undoubtedly heartless hirelings and men of the most brutal type. Moawiya was a man who got Mohammad, son of Caliph Abu Bakar, burnt alive in a skin of an ass. He was a man who contrived under fraud of calling Hazrat Aisha to his place to dine, got her seated over a deep pit, and got her pulled down therefore and killed thereby for the simple reason that she opposed the illegal nomination of Yazeed. This much at any rate can be said with certainty that there is at least ample historical material for a belief that Moawiya, Yazeed and murderers of Hussain were the worst species of men and the belief of this kind entertained by the Shias since centuries past cannot be said to be ill-founded. They believe that Yazeed was responsible for Hussain's cold blooded murder and the first three Caliphs as the original and the principal agents that procured those incidents. The Shias have been carrying of these Tazia processions with weeping and wailings in Persia and in India, at least since the 16th century

A.D. (vide the Golden Deeds of Imam Hussain pages 1 & 2). This is a question of history which few can deny and it is a matter of common experience and knowledge of even the oldest living men among us that we have been seeing these Tazia processions and weepings and wailings of the Shias therein since our early childhood. A Tazia is nothing but a miniature of the Mausoleum at Karbala and weepings and wailings recite in Marsia poems: the various heart rending and pathetic incidents of how Hussain and his seventy-two men were dealt with by the huge army of Yazeed. They walk bare footed and bare headed beating their breasts in extreme agony for the fate of their Hero all along the route of their procession. Can even the most septic among us venture to say that the Shias have been doing all this for a mere show or a Tamasha or for the purpose of wounding or injuring the feelings of the Sunnis and Nasbis and for annoying them?. Nobody can believe such a version of fact. They weep while carrying on their procession with various emblems and ceremonies, they recite the circumstances in detail, of the causes, incidents and details of that chapter of their history. It is a very logical result of all this that they censure and condemn the murderers of Hussain and the people who are personable for that massacre. It is impossible to refrain from condemning these men while celebrating the martyrdom of Hussain in its complete effectiveness. The picture of that drama can never be complete unless this part of the story is also properly painted with its bold outlines and colour. How can you celebrate the murder of Hussain without saying who are the persons who murdered him and,

what the kind of those men were and whether they are condemnable or not.

It cannot therefore be said that the conduct of the Shias in condemning and calling imprecations on the murderers of Hussain or on the first three Caliphs is not an act done in pursuance of their deep rooted faith and belief based on traditions and practices of centuries past. Calling imprecations, or Lans is nothing but an expression of the fact that God's mercy be denied to these men. It is nothing but an appeal to Almighty to punish these men adequately and properly. These murderers or the first three Caliphs no more exist now. What else can be possible form in which the Shias can peacefully avenge the historical injustice done to their Heroes, than meekly and submissively appeal to the Almighty for His proper justice on the Final Day of Judgment. The point is whether the fact that somebody does not like these appeals to Al-mighty should be sufficient to disentitle the Shias from exercising the legal rights which on the authority cited above vests in them. I, for one, will not agree for holding such an opinion. Appealing to God for with-holding His mercy does not amount to actually punishing. Then it is impossible to believe that God will necessarily accept the prayers of the Shias or that the Prophet himself will be in-fluenced by the same for his intercession on the Day of Judgment. I do not find any conceivable ground therefore, for these Sunnis and Nasbis taking any religious objections for these airy lamentations or prayers. So far as the Sunnis are concerned their ground of objection to these acts of the Shias have

been out in the written Statement which I have detailed on the second page of this judgment in seriatim. Let me take those points one by one :

- (1) The first ground of the Sunnis is that the Shias, while carrying their processions, secretly call Lans on the first Caliphs and that it is illegal and they cannot be allowed to do so. It is the defendants' case that the Shias secretly do this and hide the same under the sound of drums, professing all the way to the outside world that they are calling Lans on the murderers of Hussain. It is the Sunnis, case that such Lans of the Shias on the three Caliphs is not allowed to be made audible by them to the outside public. I think this objection is frivolous. A man has every right to say anything that he likes in his mouth or in a sound that is inaudible for others. Moreover as shown above the Shias have every right to condemn and imprecate the first three Caliphs on account of their honest and bonafide religious belief against them and the Sunnis and Nasbis cannot object to it on the ground that the same hurts their religious susceptibilities. And hence even if the Shias recite Lans on the first three Caliphs on the public high-way audibly they are perfectly entitled to do it.
- (2) The fact that some of these murderers were relation of Ali or the Prophet or that they were Musalmans can be no ground for not calling Lans on them if they are believed to have been

guilty of the massacre of Imam Hussain. Even Abu Sufian and Moawiya were the distant kinsmen of the Prophet himself. They all belong to distant kinsmen of the Prophet himself. They all belong to the same Qureshi tribe of Arabia and there were large number of pagan kinsmen of the Prophet's Mission and religion. Can we say that the mere fact of their relation-ship will be sufficient to check their condemnation?

- (3) The existence of Nasbis in this town is very doubtful. I suspect that the question of existence of Nasbis has been set up by the Sunnis simply because so far as the Sunnis are concerned they have very little religious or legal grounds for objecting to the calling of Lan on the murderers of Hussain. They Shias in this case do not pray for a declaration of calling Lans on the first three Caliphs and hence no decree can be passed for that in this case and the Sunnis are secure so far as that controversy is concerned. In the written statement itself the defendants do not mentioned that there is a class known as Nasbis in Jaunpur, who treat Moawiya and Yazeed as their Peshawa. They merely personally hint that there is a class in Jaunpur which treats Yazeed and murderers of Hussain as their Peshawa and hence that fact is likely to cause breach of peace. Only one witness Abdul Aziz D.W. 8 has been produced who says that he is a Shia of banu Ommaiya. He says that the enemies of this class namely the Shias call them as Nasbis.

(deserters). He says that he calls Yazeed as Imam and Khalifa and the others alleged murderers of Hussain or the helpers of Yazeed (Gazi, Mujahid and Ansar). He says that if Lanat is said on any of the seven persons desired by the plaintiffs, his class-men namely the Nasbis would feel their sense of religion highly wounded and it will cause excitement. He says that there are about one thousand to twelve hundred men of this class in Jaunpur. This man is an ordinary servant getting Rs. 20 a month in a Madrasa and does the work of collecting funds. He was also in service in an orphanage belonging to Sunnis to getting Rs. 10 p.m. as his pay. He has not cited any authentic authority or books wherever the belief alleged by him is entertained by any section of his class. Some of the other witnesses of defendant also mention the facts of the existence of Nasbis in Jaunpur. The most striking fact to be noted in this connection is that the dispute regarding the Tabarra has been continuing in Jaunpur for several years past. Not one Nasbi has ever been heard to raise objection to the Shais Tabarra or to make a complaint to the District Authorities against the Shias for its stoppage. All that we hear now is that during the tendency of this case a suit has been filed by some men alleging to be Shian-i- Banu Ommaya for declaration against the Shias that they have a right of taking out procession and calling praises on the murderers of Imam Hussain. Only year before last witness

D.W. 8 Abdul Aziz got a notice for the first time published declaring the intention of starting such a procession. All these things convince me that the plea of existence of Nasbis in Jaunpur and of their holding Yazeed and the murderers of Hussain as religious Peshawa is unworthy of belief. On facts therefore, I hold against the defendants on this point of the existence of Nasbis in Jaunpur or of their alleged belief. Assuming however that such a class does exist in Jaunpur and that they have a belief that Yazeed was and is their Peshwa and that the recitations of Lans on the murderers of Hussain injure their religious feelings. I am of opinion that on the principles of law stated above, their objections of this type cannot be allowed to interfere with the bona fide exercise of the legal rights of the plaintiffs. I have read carefully the whole of the evidence of the defendants on this point. Their whole case and evidence is that the plaintiffs exercise of the legal rights prayed for causes annoyance and injures their legal susceptibilities and feelings and hence on that ground they want that the plaintiffs rights should be refused. They do not believe infringement of any legal physical rights of theirs. They do not plead or prove any real injury to them. Real injury is physical and tangible injury to a legal right. It is not national sentimental or religious right. I have pointed out above that this point has been particularly emphasized in two of the decisions referred to

above. The defence case on this point also, therefore, fails.

(4) The fourth and the last plea of objections is that Taziadari as a whole accompanying with all its ceremonials and music and wailings and weeping is against Islam and against Shias religion itself, and hence also Shias are not entitled for the relief. The mere point that the plaintiffs acts are against Islam or against strict tenets of Shia religion itself will not entitle the defendants to object. I have shown above that the Shias in general have a very genuine belief in the acts desired by them and they believe it as part and parcel of their own religion. It is quite sufficient for purposes of civil court decision that their exist such a genuine belief in the plaintiffs. I have not to decide whether that belief is right or wrong. And it is immaterial whether that belief is against true spirit of Islam or Shia religion. Before closing this aspect of the case I would set forward some relevant authorities of authenticity wherefrom I am satisfied that the beliefs of the Shias on the religious point in controversy and founded upon sufficient religious materials from which we can infer that there's is a genuine, honest and bonfire religious belief on these points.

Imam Reza (A.S.) said one who sees beer and a chess play and recollects Hussain and imprecate Yazeed and his descendants, God shall forgive his sins

although his sins amount to as much as stars. (Beharul-Anvar, Vol. 10 page 184). There is another tradition from Rayan Bin Shabib, wherein it is said that if a man wants to go to Paradise must call Lanat on the murderers of Hussain (same book page 194). There is another tradition of Abu Abdullah which is also to the same effect (vide same book page 185). We further find the following by the same author : "So said Prophet, 'May God keep the murderers of Hussain away from his mercy and their friends and helpers also and also those who do not imprecate them without good cause.'" We find the following in another book of authority of Shias" And Hussain, son of Ali, was killed at Karbala aimed by Sinan, son of Anas. May God keep them away from mercy... and the belief in God, the Prophet and Imam is not complete without our disapproval of enemies. Our belief is that the murderers of Prophet and Imam are non-believers and will be entered in Hell for all times. (The Aitekadia Shaikh Sadiq). There is another tradition to be found in Musirul Ahnan by Jaffar bin Mohammad bin Namma, wherein it is recorded that when the illness of the Prophet became serious, the Prophet clasped Hussain and said "What I have to do with Yazeed, may God not bless him. O God, have Yazeed away from mercy." The Prophet's eyes were shedding tears, "Yes, I and the murderers of Hussain will be before God on the Day of Judgment". The next tradition is as follows : "O my God keep the people who murdered Thee (Hussain) and the people who oppressed and those who heard of it and agreed with it be away from mercy" (Zadul

Maad, page 83). There is another such tradition in the same book at page 592.

All these will show that Lanat on Yazeed and the murderers of Hussain is enjoined by tradition accepted as correct by high Shia authorities.

"Every crying and wailing is not approved. Except the crying and wailing on Hussain" (Manala Yahzurbul Fakih, page 179). In Beharul Anwar at page 180 we have a tradition from Imam Ali Raza where the celebration of Moharrum, and weeping and wailing over the martyrdom of Hussain has been enjoined. In the same book volume X page 172, there is a tradition in which it is said that when Hussain was born, the child was given to the Prophet, the Prophet then wept and told Asma that he would communicate a sad news to her and he said that the boy will be murdered. The Prophet said "May God curse his Murderers." "The Prophet said as follows : "I am weeping for this my son who will be killed by a group of rebels of Islam and kafirs from amongst Ommaiya. On the Day of Judgment, I shall not seek pardon for them... O God love these two (Hassan and Hussain) and love those who love these two and curse those who are the enemies of these two, whether they be living or dead. In the book known as Zakhirat-ul- Maad at page 635, we find that sanctions have been given for weeping and wailings for the beatings of breasts, faces and the heads in the mourning of Imam Hussain and for drums and other music : in the same, there is another authority for the same in Malana Yahzuri Fakih, page

57 Vol. 1. There is a tradition in Rauzatus Safa at page 97 where in it is recorded that on the death of Hamza, the Prophet required that the ladies of his house should weep and wail over his death and he woke up at midnight and heard the cries of the ladies, he said "May God be pleased with you and with your descendants and their descendants." In the book Tazkira-i- Khwas-ul- Omma at page 154, we find that Hussain is described as the Martyr of Islam, at page 162 of the same book there is an authoritative pronouncement of the facts that Yazeed was a condemned person and that Yazeed and the murderers of Hussain were very fit persons to be Lanned. I should mention is this connection that there is a famous tradition that the Prophet had declared that all those who had partaken in the battle of Constantinople were pardoned and it is said that Yazeed had taken part in that battle and hence it is unIslamic and against the injunction of the Prophet to call Lan on him. For calling Lan on him means a statement that he shall not be forgiven. In this very book at page 162, reference has been made to another tradition wherein it is laid down that the Prophet had said "Who threatens the people of Madina, God threatens him and the curse of God and the Angels and all the people be on him on the Day of Judgment none of his actions will be accepted." And then the author of that book relates the tradition from Bukhari to the effect that anybody who intends an evil to the people of Madina will be sent to Hell. About the tradition of Constantinople, he says that this refers to Abu Ayub Ansari. This book is a book of Sunni authority and thus on the tradition of

Madina it is accepted on all hand that Yazeed did cause destruction of the people of Madina and hence on basis of that tradition which incorporates the Prophet's injunction, Yazeed must be sent to Hell. If on the strength of authority like these the Shias entertain the belief which is a subject matter of the suit, I think their belief is sufficiently well founded.

The plaintiffs have produced five witnesses in all. P.W. 1 is Abdul Gafoor, he states that he is a lecturer in religion. He says he has studied Muslim books both of Shias and Sunnis. He deposes that every act of the plaintiffs in controversy in this case has full support of Islamic religion. He definitely says at page 6 that there is no sect among the Musalmans which considers the murderers of Hussain as good people. P.W. 2 Talib Hussain is a big Zamindar paying land revenue of seven hundred to eight hundred rupees per year. He is a Shia. He also supports the first witness. At page 3 of his deposition he says that there were no Shian-Bano-Ommaya in Jaunpur upto this time. P.W. 3 is Syed Fazal Ali. He is a person versed in Islamic religion. He also proves the plaintiffs facts alleged in this case. P.W. 4 is Fasahat Hussain who pays Rs. 287 as income tax. He also supports the plaintiffs' version. P.W. 5 is the last witness, i.e. Muzaffar Hussain. He is an alim of Shia religion and proved with reference to books of Shia authority the truth of the plaintiffs' belief. These witnesses are all Shias as all the witnesses of the defendants are Sunnis. The weight of the oral evidence of the plaintiffs side so far as they go, is to my mind comparatively heavier than that of the

defendants oral evidence. Generally speaking the plaintiffs' witnesses who speak on facts are people of higher status. The defendants have examined 8 witnesses in all D.W. 1 (Mohammad Ayub Siddiqui) is a Sunni Alim. He says that according to Sunni religion, calling of Lanat on any definite person by name is illegal. He says that there are some Nasbis in Jaunpur. He further says that the procession of Tazia and its adjuncts are all illegal under Shia law. He admits that the murderers of Hussain were all bad people. This witness is an ordinary person getting 28 p.m. as his salary. D.E. 2 is another Sunni Moulvi Ali Hassan. He is a defendant in this case. He also states the same facts as stated by D.W. 1. As a defendant, he is highly interested in the result of the case and I do not think any safe reliance can be placed on his testimony. D.W. 3 is another defendant who says nothing on main facts of this case. He comes up only to state that the plaintiffs have no cause of action against him. D.W. 4 to 6 are defendants of this case and have come only to deny accrual of cause of action of this suit against them. D.W. 7 Hakim Mohammad Yazeed is a Sunni Alim. He gives in detail the principal beliefs that are requisite for true Muslim. He also states that there are Nasbis in Jaunpur. His statement also therefore, whatever it be, cannot be safely believed. The last witness D.W. 8 is Abdul Aziz alleged to be a Nasbi and I have said enough about him.

I have discussed this evidence rather in short for I think that the kind of evidence adduced by the parties in this case on their respective beliefs and cross-beliefs

is not very material for the purpose of this case. This Court or for the matter of that, any civil court cannot sit as a judge of Muslim theology and decide on merits whether the Shia belief or the Sunni belief is correct. Nor does the decision of this case hinge on the decision of that point. Parties have led evidence to prove that on the strength of books of Islamic theology their respective faiths are correct and those of their adversaries incorrect. The only relevancy of this evidence of the parties is on the point whether the belief of the Shias for their religious processions and other rights pertaining to the same for which they claim a declaration are based on a bonafide notion or whether they are sham exhibition, all intended to be done for wounding the religious feelings of the defendants. If the plaintiffs can satisfy us as they have done in this case, that they have been entertaining their beliefs since long and acting upon them on the basis of their own Shia authority and that the Tazias and the Lans and the music in question are all being observed in pursuance of that deep-rooted faith, then the Court must protect that right and grant the declaration, howsoever wrong or illogical or foolish that belief may be. Judged in this light much of the stress laid down by the parties on this part of the case has been valueless.

Such being the situation, it is impossible to say that the plaintiffs do all these acts referred to above. As to whether such act can every amount to a nuisance, Hon'ble Mukerjee J. has sufficiently discussed the law on the point at pages 638 to 642 of 1931 A.L.J. 624 already referred to. I have further carefully analyses the

aforesaid sections of Penal Code and scanned the relevant authorities on the point and attempted to see if the plaintiffs' conduct of this case can, in any sense, fall within the mischief of any of these sections and have come to the conclusion that it is impossible to hold for the defendants on this point. As I have pointed out above it is impossible to hold on facts that the Shias perform thereat with any intention to annoy anybody's religious feelings. They do it all to commemorate the memory of their Hero and celebrate his martyrdom. If doing so hurts the religious feelings of a section, that alone will not be sufficient to bring the acts of the Shias within the ambit of an offense. Leaving Section 153-A aside, malicious and deliberate intention of wounding the religious feelings of others is the chief ingredient of the offense laid down in other sections of I.P.C. aforesaid (259-A and 298) and we have therefore littled to speak of their possible applicabilities to the plaintiffs in this case. So far as section 153-A I.P.C. goes we have to note that the explanation appended thereto does considerably soften the vigor of the main section for cases where the speech or writing is resorted to without malicious intention and with an honest view, (vide 197- 46 C.L.J. 154) Even in the case of Resal-i- Vartman reported in A.I.R. 1927 Lahore 594, Hon'ble Broadway and Shimp, JJ, while very rightly convicting the accused under section 153-A I.P.C., made specific reservation for cases of honest expressions of opinion about other religions and their founders made without any malicious intentions. That was a case where a contributor of an article 'Siar-i-Dozakh' made

vituperative and scurrilous attacks on the life of the Prophet and his wives and associates in the vilest and the most abusive of terms. He described the Prophet, his wives and companions all condemned to hell and suffering extreme tortures. He attempted to convey in disgusting manner and dirty taste and filthy language that the Prophet was unfit to be an 'Intercessor' for his followers.

Such is not the case here. All that the Shias do is that they weep on the fate of the Hero and in that strain of sorrow condemn his murderers with a language which is nothing more than that Yazeed and his men who murdered Imam Hussain be kept away from the mercy of God and His curses be on them. Can this language be said to be vituperative, scurrilous, vile and abusive in the words of that Lahore ruling. Their Lordships observed in that case "It must be the purposes and part of the purpose of the accused to promote such feelings and if it is no part of his purpose, the mere circumstance that there may be a tendency to create feelings of enmity and hatred is not sufficient". Their Lordships further accepted the observation of the F.B of our Hon'ble High Court in the famous Vichitra Jivan case reported in 1927 Allahabad 649 which were "It must be recognized that in a country where there is religious freedom in a certain latitude must of necessity be conceded in respect of the free expression of religious opinion together with a certain measure of liberty to criticize the religious beliefs of others. But it was pointed out it was contrary to all reason to imagine that liberty to

criticize includes a license to resort to vile and abusive language. This Bench of Lahore High Court did not disapprove of the views taken by Hon'ble Dalipsingh, J. in the notorious Rangila Rasool case decided only a short while before creating considerable sensation in the country which is reported in 1927 Lahore 590, which case considerably supports the plaintiffs' view in this case. In the Full Bench decision of the Vichitra Jivan case reported in A.I.R. 1927 Allahabad 649, their Lordships held that the language employed in the book of Kalicharan Shrima of the name aforesaid was grossly indecent and the author in that book accused the Prophet of 'Drunkeness, superstition, adultery, incest and bestiality', (page 65) and his entire language was flagrantly indecent, caustic, provocative, vituperative and full of grossest obscenity. Their Lordships in that case also very rightly held against the author but even then the judgement of Dalipsingh, J. was not different from. In the same case, however, arising out of the criminal prosecution of that accused, Hon'ble Dalal, J. sitting singly, convicted the accused and His Lordship did not follow the dictum of Hon'ble Dalipsingh, J. (A.I.R. 1927 Allahabad 659). But I have pointed out above that the language employed by the accused as held in those cases was rather hellish and no two opinions were possible thereon. Here in this case, there is nothing of the kind. It cannot, therefore, come to the conclusion that the act of the plaintiffs amounts to any offence or to any nuisance.

There is one more general legal aspect of the case which may profitably be mentioned in this

connection. The rights claimed by the plaintiffs are Common Law rights and rulings apart, I think they can be upheld on general principle, Dicey, in his Constitutional Law, 6th Edition at page 445 discusses this subject. He observes that it is a common Law right of every citizen to go to a public place and there express his opinion upon any subject provided that he does not commit a breach of the law in so doing.

A right of assemblage and free expression of opinion on any subject by the assembly or by the individuals thereof is an inherent right of every citizen. An individual or a collection of individuals has and have a right to pass or repass on every public street or highway for they are dedicated for that purpose. But passing or repassing on a public street or highway does not mean keeping mum. Individual have a right to speak while on the public road. A procession is nothing but an assembly in motion and such procession therefore has all the rights which individuals own on a public highway.

Calling Lan on the seven persons alleged by the plaintiffs to be those who are responsible for the murder of Hussain is nothing but an expression of opinion on their historical deeds. If this expression of opinion is made for missionary purposes, for extolling one's own religion or for celebrating the martyrdom of one's Hero or as a part of religious observance, I think no sensible objection can be taken to the same inspite of the fact that these expressions of opinion may annoy

or injure the susceptibilities of a section of the public. I, therefore, hold for the plaintiff on both these issues.

Issue No. 3

The Secretary of State for India is not a necessary party in this case. The Executive authorities of the District are alleged to have acted only under section 144 Cr. P.C. and their acts under that section however wrong, cannot furnish a cause of action against these officials or against their master, the Secretary of State. I decide this issue in the negative.

Issue No. 4

Plaintiffs' case is that the defendants had been denying the plaintiffs' rights and they have been responsible for issue of notices by the authorities putting obstructions in the free exercise of the plaintiffs' rights and hence the plaintiffs alleged a cause of action against the defendants. The defendants put in a contest of very serious type and have fought tooth and nail on every little bit of facts alleged by the plaintiffs denying all their facts and all their rights. The case has had its long trial partly before the learned Civil Judge, and partly before me. I have had the opportunity of conducting the trial and watching the proceedings for about a fortnight. I found the tense atmospheres prevailing all through and persons numbering over 20 to 50, and sometimes even more belonging to the respective communities thronging the Court-room and its near abouts with the most concern watching all that

was happening in the case. I have not the slightest doubt in my mind from what has passed before me that the Sunnis as a class are highly interested in denying the plaintiffs' rights. Fasahat Hussain, plaintiffs' own witness thus admits that the Sunnis did complain to the Local Authorities against the Tabal and Tasha of the plaintiffs' procession which the authorities through their notices, stopped under section 144. The evidence of Mohammad Ayub, D.W.I. also proves that the defendants are interested in denying the plaintiffs' rights. In fact, every witness of the defence side, excluding the three witnesses who have said nothing on facts, have all denied the plaintiffs' right. We have to note that a suit under section 42 S.R. Act can lie also against persons who are interested in denying the plaintiffs' (Vide A.I.R. 1930 Lahore page 803, 19917 Madras 749 and 461 I.C. 553) I think there is a clear cause of action for the plaintiffs in this case against the Sunnis as a class.

Issue No. 5

It has been argued on defence side that the grant of declaration rests within the exclusive discretion of the Court and it is not a right of a plaintiff to claim a declaration as a matter of absolute right and that as a grant of this declaration may lead to disturbances of public peace, as the feelings between the two communities are running high, the Court should refuse (the) declaration. I think the facts pleaded by the defence side make it incumbent upon the civil court all the more to define the parties' legal rights finally and

once for all and give in the hands of the executive authorities as is manifest from the materials of the record have been groping in the dark and have not been armed with any authoritative decision as to what are the legal rights for these acts ordered to be suppressed really vested. When the Executive authority not knowing the legal rights of the parties passes an order that infringe the exercise of the legal right of a section of the public that cause legitimate heartburning and proves an inevitable source of future breaches of peace. A vicious circle of coercive orders being passed against lawful rights and breaches of peace occurring in consequence thereof is formed and the result is what we very often find, year after year breaches of peace occurring in some form or the other, elaborate arrangements made for the suppression of the legal right. On a careful study of the legal literature available at this place on the subject, I am of the opinion that the order passed under Section 144 Cr. P.C. by Executive authorities under their uncertainties as to the legal right, fails as a remedy and sometimes aggravates the disease for the cure of which it may be so genuinely intended. In my humble judgement in all such cases of dispute between a class and a class or a community and a community or the authorities must attempt their best to find out from high legal authorities as to wherein does the legal right vest, and having once found that out stick to the same, protect that legal right with the whole might of the State available to them, That may create difficulties on one or two occasions but the parties will inevitably settle down to their own rights and rest at peace as water, when allowed to flow to its

natural position, finds its own level and remains at rest at that level. I will close the judgement with some of the observations of the Judges of the Hon'ble High Court on this subject whose views have been approved by Their Lordships of the Privy Council referred to above. The substance of these observations are that the Executive authorities, the Police and the Magistracy exercising their power under section 144 Cr. P.C. and 133 Cr. P.C. and section 30 of the Police Act No 5 of 1861 and these are the only provisions under which they have a right to interfere (Bennet, J. in 1931 A.L.J. 624 & 627) should always exercise their power in favour of the person owing the legal right and for his protection and for the suppression of the person who interferes with that right. But in a case of emergency where their resources are inadequate to protect the legal rights and a breach of peace is imminent and they are taken unawares, they can then suspend the exercise of the legal right temporarily. Their Lordships of Madras High Court observed as follows in 2 Madras 140 "for the preservance of the public peace he (the Magistrate) has special authority, an authority limited to certain occasions. His first duty is to secure to every person the enjoyment of his rights under the law and by measures of precautions to deter those who seek to invade the rights of others, but if he apprehends that the lawful exercise of rights may lead to a civil tumult or render it innocuous, regard for the public welfare is allowed to override temporarily the private right, and the Magistrate is authorised to interdict its exercise. The duration of this authority in the

Magistrate is coextensive with the emergency that justified the exercise of the authority".

The same High Court in another case, 6 Madras 203 observed as follows: "Where rights are threatened, the persons entitled to them should receive the fullest protection the law affords them and circumstances admit of. It needs no argument to prove that the authority of the Magistrate should be exerted in the defence of the rights rather than in their suspension in the repression of the illegal rather than the interference with the lawful acts". Such an order issued under such circumstances involves an admission that lawlessness is anticipated and that at the time the Executive is not in a position to afford adequate protection. When such orders are repeated their justification, the preservation of public peace, is not so obvious to those whose rights they interfere with as are their results. The impression is created that the authorities are powerless against the class from whom the violence is apprehended and that a show of force similar to that which has rendered a judicial award practically in operation will be effectual to secure the recognition of civil rights than an appeal to the constituted tribunals. Where this impression takes hold of the minds of a large majority of population, graver dangers are to be apprehended from refusing them from conceding protection to the legitimate enjoyment of civil rights. Men to whom obedience to authority is distasteful are to be found in every party, but even those who are ordinarily anxious to uphold authority may be seduced by a sense of hardship and the example of successful tumult.

Their Lordships of the Privy Council have accepted this as correct pronouncement of the law of the land and I do not think better language can be employed and found for the expression of the opinion on the duties of the Magistracy and police than these observances of Their Lordships. The plaintiffs certainly have a right for the declaration they claim. But in (the) exercise of legal rights situations may crop up where the Magistrate and the Police may find it necessary to put restrictions on the exercise of that right for averting breaches of peace or for avoiding blocking up thoroughfares. That right inherently vests in them under the provisions aforesaid. A provision therefore has to be added to the declaratory decree. I therefore pass the following decree in favour of the plaintiffs in terms of the substance of the decree awarded by Hon'ble Suleman and Young, JJ, in the case reported in 1931 A.L.J. 354 :

ORDER

The plaintiffs of this case both in their individual capacity and as a member of the Shia community of Jaunpur have a right to take out their procession claimed by them in relief of the plaint in accompaniment of Tasha and Tabla and with Nauha and Matam in commemoration of the martyrdom of Imam Hussain and with recitations and callings of Lans (imprecations) on the seven persons named in that list on every street and highway of Jaunpur and on

Qazi-ki-Gali specified and claimed in that relief. This declaration of the plaintiffs right is subject to any order of direction issued by the Magistrate or the Police for preventing breaches of public peace or obstructions of thoroughfares or for other matters mentioned in Section 144 Cr. P.C. or under other statutory provisions or for regulation of traffic. The plaintiffs will get their costs from the defendants.

Sd.
T.P. DUBEY,
Jaunpur Munsif.
20-7-1938

